

<sup>1</sup> Administrator's Decision on Appeal dated March 8, 2004, attached hereto as Exhibit 1.  
Billed Entity No. 124492; Funding year 2003; Form 471 No. 341529; Funding Request Numbers: 932975, 932981, 932989, 932997, and 950699; Funding Commitment Decision Letter dated 6/23/03.

This matter involves a 2003 Funding Year request for E-rate discounts on a leased, dark fiber wide area network ("WAN"). Leased dark fiber was a telecommunications service eligible for E-rate discounts during that funding year. Thus this Request for Review should be considered in that context.

The most noteworthy conclusion in this entire matter is the one the SLD never made. Significantly, the SLD did not conclude that OCM-BOCES requested funding either to purchase or build a dark fiber wide area network. Instead the SLD focused its attention narrowly and exclusively on "verbiage" in our contract that gave us exclusive use and control of some of the dark fiber strands (twelve out of at least 72) in our provider's dark fiber cable. Because this "verbiage" appeared in our contract, the SLD concluded, our leased, dark fiber WAN could not receive E-rate support. The SLD's decision was wrong. Our leased, dark fiber service was not rendered ineligible simply because we exclusively controlled some of the strands in our provider's dark fiber facilities. To the contrary, that fact, along with all of the other factors relevant to our lease transaction, which the SLD should have considered but did not, established clearly that our leased, dark fiber service was an eligible service entitled to funding.

While the SLD was obviously trying to apply the Commission's rule prohibiting support for building or purchasing telecommunications facilities to the facts in this case, the SLD's attempt completely missed the mark. Rather than applying the Commission's well-established multi-factor analysis to our dark fiber transaction, the SLD decided instead to create and apply a Google search-type test based entirely on whether the word "exclusive" appeared anywhere near the words "fiber strand" in a contract for the lease of a dark fiber WAN. Those words did appear that way in our contract, and that, unfortunately, is why we are here.

What the undisputed facts in this case show and thus what the SLD should have concluded is that (1) the industry practice of granting customers exclusive use and control over leased dark fiber strands in a bundled fiber cable is necessary and the norm for reasons related to cost, technology, and network security; (2) we requested E-rate support to help us lease a dark fiber WAN; and (3) we did not request support to purchase or build a WAN. Accordingly, we request

that the Commission remand this matter to the SLD with instructions to fund all of our requests in full.

In support of our Request for Review, we direct the Commission's attention to our Letter of Appeal to the SLD, which we have attached hereto as Exhibit 2. In addition, we respectfully request that the Commission consider the following:

### **FACTS**

Fibertech is a common carrier eligible to receive universal service support. Fibertech leased to OCM BOCES, a regional service agency-consortium, 12 strands of dark fiber in bundled fiber cables that it owned, maintained and paid property taxes on. For this leased, dark fiber service, OCM BOCES paid Fibertech a monthly fee and no up front costs. Fibertech's facilities that served OCM BOCES included at least 60 additional strands of dark fiber. Fibertech leased some of those strands to other customers, like Verizon and AT&T. It marketed the remainder to prospective customers. OCM-BOCES did not have the exclusive right to use and control Fibertech's telecommunications facilities (i.e., its bundled dark fiber cable), but rather, shared those facilities with Fibertech's other customers. The parties' contract did not include a lease-purchase option.

It is standard industry practice to grant to customers that lease fiber the exclusive right to use an agreed upon number of strands in the provider's cable. Sharing an individual strand of fiber is impractical; it is generally much too expensive and too technologically demanding even to consider. Furthermore, the networking professionals with whom we have consulted have informed us uniformly that sharing a strand of fiber among multiple customers would create a security nightmare.

### **DISCUSSION**

The SLD rejected OCM BOCES' funding request for the following reason (Administrator's Decision on Appeal at p.2):

A contract was provided as an item 21 attachment and within the contract, it states the following, "Madison BOCES will have exclusive use and control of the fiber strands for the term of the agreement and any extension or renewal thereof." *Based on this verbiage*

*within the contract the requested funding is deemed ineligible based on exclusive WAN use. Even though in the appeal it is stated that OCM BOCES does not have exclusive use of the fiber strands, it is specifically stated in the contract that OCM BOCES will have exclusive use and control of the dark fiber. Based on the verbiage stated in the contract the funding request is denied. (Emphasis added).*

Your Form 471 application included costs for the following ineligible services:  
Exclusive use and control of dark fiber.

In support of its conclusion that “exclusive WAN use” leads *automatically* to ineligibility, no matter what the circumstances, the SLD cited the USAC Eligible Services List. We have reviewed USAC’s Eligible Services List carefully, but can find nothing in it to support the SLD’s conclusion. Furthermore and more to the point, we cannot find anything anywhere that states or even implies that exclusive use and control of fewer than one hundred percent of the dark fiber strands in a provider’s facilities renders that service automatically ineligible. We are not surprised because it makes perfect sense that the exclusive right to use a fraction of the dark fiber strands in a bundled fiber cable does not render an otherwise eligible leased service automatically ineligible -- as a matter of law. No doubt it could conceivably lead to that conclusion, as one of many factors to be considered as part of a broader, more complex inquiry into whether a lease is really a purchase, but the exclusive right to use and control merely *a fraction* of the fiber strands in a provider’s facilities is not, by itself, enough.

Getting “behind” a lease transaction to determine whether it is in fact a prohibited contract to build or purchase a wide area network is not a simple process, but that is apparently what the SLD wants to turn it into. For purposes of this kind of transactional analysis, the exclusive right to use or control telecommunications facilities is only *one* of several factors that the Commission has instructed the SLD to consider. Indeed, on its own Web site, the SLD makes that point perfectly clear.<sup>2</sup>

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<sup>2</sup> On its Web site, the SLD states as follows: “The FCC has recognized that some business arrangements between an applicant and service provider, even if labeled a lease of services, can reach essentially the same result as a prohibited WAN purchase by applicants. The SLD will not commit to discounts on an agreement that is titled or described as a lease when in effect the terms of the agreement constitute a purchase.

*Factors evaluated when making this determination include whether the applicant has exclusive access to the WAN facilities, whether a lease-purchase agreement exists, and whether a substantial payment for upfront capital costs is part of the agreement. Contracts with an option for the applicant to purchase WAN facilities will not be funded.”*

Notwithstanding the Commission's instructions (memorialized in the SLD's rules) to examine each transaction in its entirety, the SLD inexplicably decided to begin and end its analysis with whether "verbiage within the contract" provided for the "exclusive use and control of the fiber strands." The SLD did not appear to be interested in (1) how many other strands Fibertech was using to serve other customers, (2) how many strands Fibertech had available to serve new customers, (3) how much OCM BOCES was paying Fibertech for the leased fiber on a monthly basis, (4) whether and how much OCM BOCES paid up front to Fibertech for the service, and (5) whether there was a lease-purchase option. Rather, the SLD fixed its attention, laser-like, on one single thing: the fact that the words "exclusive use and control" and "fiber strands" appeared together in the parties' service agreement.

The SLD's rule is unlawful because, as the program administrator, it had no authority to make it. Even if it did, a rule that disqualifies otherwise eligible telecommunications services from receiving E-rate support solely because the words "exclusive use and control of fiber stands" appear in an applicant's contract is simply too one-dimensional to adequately serve its intended legal purpose. It is also important to keep in mind that a rule that makes a few strands of leased fiber ineligible simply because a school or library exclusively controls them makes no sense in the real world of leased, wide area, fiber networking (dark or lit), as it is neither technologically nor economically realistic for a customer to share the same strand of fiber. The thought of two or more customers sharing a strand of dark fiber is likely to make most network security experts shudder. Thus, while the SLD's desire to ease its administrative burden by creating simple, clerical-type rules is understandable, the fact remains that it has no legal authority to do so where eligibility issues are concerned.

Section 54.518 of the FCC's rules states that schools and libraries are not eligible to receive universal service discounts for the building or purchasing of wide area networks. Schools and libraries are permitted, however, to receive universal discounts on WANs that operate over lines the schools and libraries have leased from service providers.<sup>3</sup> The determinative issue in this

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Emphasis added. (Wide Area Network Fact Sheet, Evaluation of the Applicant Ownership Prohibition  
<http://www.sl.universalservice.org/reference/wan.asp>)

<sup>3</sup> Universal Service Order, *Fourth Order on Reconsideration*, 13 FCC Rcd 5318, para. 193 n. 585 (1997).



case, therefore, is whether OCM-BOCES contracted with Fibertech to lease or purchase a dark fiber WAN. To determine whether a WAN transaction is a lease or a purchase, the Commission looks at factors such as: (1) whether the applicant has exclusive access to the facilities; (2) whether the "lease" agreement effectively amounts to a purchase or construction of the facilities by the applicant or contains an option for the applicant to purchase the WAN facilities; and (3) whether the applicant is paying a substantial amount of the up-front capital costs.

OCM-BOCES has exclusive access to only a small fraction of Fibertech's dark fiber WAN facilities and paid nothing up front for the right to access Fibertech's facilities in this fashion. Fibertech leases strands of fiber in the bundled fiber cable facilities that it uses to serve OCM-BOCES to other large customers and actively markets the remainder. Exclusive access to dark fiber strands is the norm in the industry because of the inherent differences between fiber and copper connectivity.<sup>4</sup> Fibertech bills OCM-BOCES a monthly fee for 12 leased strands of dark fiber. If anything happens to one or more of those strands, Fibertech is contractually obligated to make the repair. Easements for the fiber route and property taxes are Fibertech's responsibility. Exclusive use and control of the 12 fiber strands reverts back to Fibertech at the conclusion of the five-year lease. *See* additional details in the attached Letter of Appeal (Exhibit 2). In sum, the relevant factors show clearly that the OCM-BOCES – Fibertech dark fiber transaction was in fact a lease and not a purchase, and thus did not amount to a prohibition on the building and ownership of WAN facilities as set forth in section 54.518 of the Commission's rules.

For the foregoing reasons, we request that the Commission reverse the SLD's decision and instruct the SLD to commit to OCM BOCES the full amount of funding it has requested for all of the FRNs in issue.

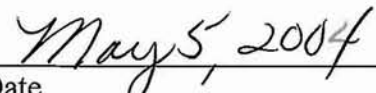
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<sup>4</sup> Notwithstanding these differences, copper WAN connectivity is also leased to customers frequently on an exclusive basis, such as in the case of dedicated T1 lines, which have always been eligible for E-rate support. In fact, in the case of virtually every telecommunications service, customers are given exclusive use of at least some of the provider's facilities. The point is that having "exclusive" use of certain telecommunications facilities does not turn a lease automatically into a purchase.

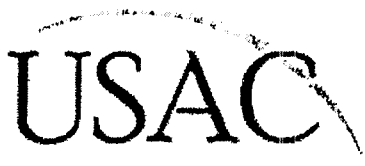
Respectfully submitted,

**Onondaga-Cortland-Madison BOCES**

  
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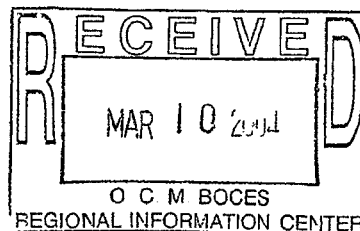
Universal Service Administrative Company  
Schools & Libraries Division

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Administrator's Decision on Appeal - Funding Year 2003-2004

March 8, 2004

Kathleen Smith  
OCM BOCES  
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Syracuse, NY 13221



Re:      Billed Entity Number:            124492  
         471 Application Number:        341529  
         Funding Request Number(s):    932975, 932981, 932989, 932997, 950699  
         Your Correspondence Dated:     August 20, 2003

After thorough review and investigation of all relevant facts, the Schools and Libraries Division ("SLD") of the Universal Service Administrative Company ("USAC") has made its decision in regard to your appeal of SLD's Year 2002 Funding Commitment Decision for the Application Number indicated above. This letter explains the basis of SLD's decision. The date of this letter begins the 60-day time period for appealing this decision to the Federal Communications Commission ("FCC"). If your letter of appeal included more than one Application Number, please note that for each application for which an appeal is submitted, a separate letter is sent.

Funding Request Number:            932975, 932981, 932989, 932997, 950699  
Decision on Appeal:                **Denied in full**  
Explanation:

- On appeal, you state that SLD's decision was based on incorrect and insufficient information in regards to the lease of Fibertech's dark fiber strands. You stated that OCM BOCES does not have exclusive access to Fibertech's network that there are no up-front costs to the lease, and the payments will be strictly in the form of monthly payments. The appeal letter also states that Fibertech retains the right to mortgage, pledge, encumber or transfer its interest in its system without OCM BOCES consent and at the end of the agreement the right to use the fiber strands transfers to Fibertech. In sum, you feel that OCM BOCES' lease of Fibertech's dark fiber strands does not amount to a prohibition on the building and



ownership of WAN facilities as set forth in section 54.518 of the FCC's rules, and the funding should be reinstated.

- A contract was provided as an item 21 attachment and within the contract, it states the following, "Madison BOCES will have exclusive use and control of the fiber strands for the term of the agreement and any extension or renewal thereof." Based on this verbiage within the contract, the requested funding is deemed ineligible based on exclusive WAN use. Even though in the appeal it is stated that OCM BOCES does not have exclusive use of the fiber strands, it is specifically stated in the contract that OCM BOCES will have exclusive use and control of the dark fiber. Based on the verbiage stated in the contract the funding request is denied.
- Your Form 471 application included costs for the following ineligible services: Exclusive use and control of dark fiber. FCC rules provide that discounts may be approved only for eligible services. See 47 C.F.R. §§ 54.502, 54.503. The USAC website contains a list of eligible services. See USAC website, <http://www.universalservice.org>, Eligible Services List. Program procedures provide that if 30% or more of an applicant's funding request includes ineligible services, the funding request must be denied. 100% of your funding requests were for ineligible services. Therefore, your funding requests were denied. You did not demonstrate in your appeal that your request included less than 30% for ineligible services. Consequently, SLD denies your appeal.

If you believe there is a basis for further examination of your application, you may file an appeal with the Federal Communications Commission (FCC). You should refer to CC Docket No. 02-6 on the first page of your appeal to the FCC. Your appeal must be **POSTMARKED** within 60 days of the above date on this letter. Failure to meet this requirement will result in automatic dismissal of your appeal. If you are submitting your appeal via United States Postal Service, send to: FCC, Office of the Secretary, 445 12th Street SW, Washington, DC 20554. Further information and options for filing an appeal directly with the FCC can be found in the "Appeals Procedure" posted in the Reference Area of the SLD web site or by contacting the Client Service Bureau. We strongly recommend that you use either the e-mail or fax filing options.

We thank you for your continued support, patience, and cooperation during the appeal process.

Schools and Libraries Division  
Universal Service Administrative Company

August 19, 2003

**VIA ELECTRONIC MAIL (appeals@sl.universalservice.org)**

Letter of Appeal  
Schools and Libraries Division  
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**Re: Letter of Appeal of Funding Commitment Decision Letter Issued 06/23/03**  
Applicant OCM BOCES  
Form 471 Application No. 341529  
Funding Year 2003 (07/01/03 – 06/30/2004)  
Billed Entity No. 124492  
Funding Requests No. 932975, 932981, 932989, 932997, and 950699

Dear Sir or Madam:

On June 23, 2003, the Schools & Libraries Division (“SLD”) of the Universal Service Administrative Company (“USAC”) issued the above-referenced Funding Commitment Decision Letter that denied Applicant Onondaga-Cortland-Madison Board of Cooperative Education Service’s (“OCM BOCES”) requests for universal service support funding for the lease of dark fiber strands from Fiber Technologies Networks, L.L.C. (“Fibertech”). The basis for denial of OCM BOCES’s funding requests was explained in the Funding Commitment Decision Letter as follows:

30% or more of this FRN includes a request for exclusive use of dark fiber, which is ineligible based on program rules.

With this letter, OCM BOCES hereby appeals the SLD’s June 23, 2003 Funding Commitment Decision Letter. As explained below, OCM BOCES believes that the SLD’s decision was based on an incorrect assumption and insufficient information regarding OCM BOCES’s lease of Fibertech’s dark fiber strands. Moreover, the SLD recently clarified its evaluation of the application ownership prohibition for wide area networks, which is relevant to OCM BOCES’s funding request. OCM BOCES submits the following information in support of its position that the consortium’s lease of Fibertech’s dark fiber strands qualifies for universal service support and is not a purchase or build of wide area network facilities prohibited by section 54.518 of the FCC’s rules.

**EXHIBIT 2**

Fibertech was the winning bidder out of 10 bid proposals that were submitted to the OCM BOCES in response to its RFP for leasing fiber capacity to establish wide area network connectivity. The OCM BOCES reviewed the results of the competitive bid and chose Fibertech through that process. OCM BOCES submitted its Form 471 application for Funding Year 2003 on January 23, 2003. The SLD issued the decision letter at issue in this appeal on June 23, 2003. As stated above, the SLD denied OCM BOCES's funding request based on its assessment that OCM BOCES's leasing of 12 Fibertech dark fiber strands amounted to the purchase of a wide area network prohibited by section 54.518 of the FCC's rules.

Section 54.518 of the FCC's rules states that schools and libraries are not eligible to receive universal service discounts for the building or purchasing of wide area networks. 47 C.F.R. § 54.518. Schools and libraries are permitted, however, to receive universal discounts on wide area networks ("WAN") that operate over lines the schools and libraries have leased from service providers.<sup>1</sup> In determining funding eligibility for WAN facilities, the FCC and the SLD look at factors such as: (1) whether the applicant has exclusive access to the facilities; (2) whether the "lease" agreement effectively amounts to a purchase or construction of the facilities by the applicant or contains an option for the applicant to purchase the WAN facilities; and (3) whether the applicant is paying a substantial amount of the up-front capital costs. In addition, the SLD recently clarified the funding eligibility for wide area networks on the issue of ownership. In its clarification, the SLD stated that while it will not fund the full construction cost of WAN facilities in non-rural areas, funding is available for a proportionate cost of WAN facilities that can be shared among multiple users. The SLD also stated that it will review contractual terms, technical configurations and up-front construction costs to determine eligibility. For the reasons set forth below, OCM BOCES's leasing of Fibertech's dark fiber is eligible for funding and does not fall within the section 54.518 prohibition on the building and purchasing of wide area networks.

1. OCM BOCES will only be utilizing a small portion of the total 72 fiber strands minimum available at each of the five sites on Fibertech's network route. The configuration provides for 12 strands between the OCM BOCES facilities and in total less than seventeen percent (17%) of the current fiber capacity of Fibertech's network on the segments used for OCM BOCES and a much smaller percentage of Fibertech's total network capacity in the Central New York region. Under the SLD program, the leasing of dark fiber requires the school to supply the optronics to light the fiber. Because only one light source can be sent over an individual fiber strand at one time, OCM BOCES's dedicated use of twelve fiber strands is necessary for service. OCM BOCES does not have, however, exclusive access to Fibertech's network. Fibertech currently leases fiber strands on this same network route to other users, such as the Verizon Global Networks, Choice One, CTC and AT&T and others. The SLD itself recognizes this distinction. In its explanation of eligibility requirements for the leasing of fiber in the provision of wide area networks, the SLD states that one of the factors it looks at is whether the applicant has exclusive use of the facilities "(i.e., the applicant has a contractual right to the full capacity of the facilities)." OCM BOCES's use of several strands within a much larger available capacity which is actively and openly marketed for use by any other parties certainly does not amount to an exclusive access to or ownership of Fibertech's network.

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<sup>1</sup> Universal Service Order, *Fourth Order on Reconsideration*, 13 FCC Rcd 5318, para. 193 n. 585 (1997).

2. OCM BOCES also will not have exclusive access to the lateral lines that will be constructed as part of the wide area network. Fibertech has already constructed its backbone network in the Central New York region. Consistent with the process for providing service to new customers, Fibertech builds lateral lines off of this network to connect its customers to the backbone. In this case, Fibertech will build lateral lines to connect OCM BOCES's wide area network to the backbone network. OCM BOCES will not, however, have exclusive access to these lateral lines. Other customers will be able to use these same lateral lines to access the backbone network. OCM BOCES will only have dedicated access to 12 of the 72 fiber strands within these lateral lines located at the respective school sites. This practice is essentially no different from any fiber extension required to provide optical level services to a customer of any service provider.
3. OCM BOCES is not going to pay Fibertech to construct its backbone network. As discussed above, Fibertech has already built and paid for its network backbone, which is currently being used by other entities and customers. In this regard, it is extremely important to note that *OCM BOCES will not be paying to Fibertech any up-front costs to lease its dark fiber transmission capacity*, OCM BOCES's payments to Fibertech will be strictly in the form of monthly payments to be made over a five-year period.
4. The terms and conditions of the Master Facilities Agreement ("Agreement") between the parties also makes it clear that OCM BOCES is to lease, not purchase or own, Fibertech's facilities. While OCM BOCES must have dedicated access to the twelve fiber strands it is leasing from Fibertech for the reasons explained above, this does not result in OCM BOCES building or purchasing Fibertech's network. As set forth in the Agreement, OCM BOCES only has the right to use the fiber strands. Fibertech retains all rights, title and ownership interest in the network and has the sole obligation and right to maintain and repair the system. Moreover, Fibertech retains the right to mortgage, pledge, encumber or transfer its interest in its system without OCM BOCES's consent. Upon termination of the lease agreement, OCM BOCES's right to use the fiber strands reverts to Fibertech. Thus, it is clear under the terms of the Agreement between the parties that this is a lease agreement between OCM BOCES and Fibertech. It is not a lease-purchase agreement; nor does it provide OCM BOCES with an option to purchase the WAN facilities.

In sum, OCM BOCES's lease of Fibertech's dark fiber strands does not amount to a prohibition on the building and ownership of WAN facilities as set forth in section 54.518 of the FCC's rules. For the foregoing reasons, the SLD should reverse its decision in its June 23, 2003, Funding Commitment Decision Letter and should provide OCM BOCES with the funding it has requested for the above-referenced application. Your prompt attention to this appeal is appreciated.

Letter of Appeal  
August 18, 2003  
Page 4

Please direct any questions regarding other matters associated with this Letter of Appeal to the following:

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Respectfully submitted,

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